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Nos. 85-983 and 85-997

In the Supreme Court of the United States

October Term, 1985

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, and UNITED TRANSPORTATION UNION, *et al.*,
Cross-Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY OF CROSS-PETITIONER BROTHERHOOD OF LOCOMOTIVE ENGINEERS TO BRIEFS IN OPPOSITION TO CROSS-PETITION

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Both the cross-respondents Interstate Commerce Commission ("ICC") and the Missouri-Kansas-Texas Railroad ("MKT") agree that the decision below should be reviewed, although they suggest that only a limited review of the court of appeals decision is warranted—a determination if a finding of necessity by the ICC is required to exempt a carrier from collective bargaining and Railway Labor Act obligations. The ICC's ambivalent expressions, however, can be viewed as sponsoring the appropriateness of what it terms the broader question put by the cross-petitioners, that is, whether Section 11341(a) of the Interstate Commerce Act automatically exempts carriers from compliance with their contractual and stat-

utory labor obligations upon approval of a financial transaction by the Commission. Cross-respondents Union Pacific ("UP") and Missouri Pacific ("MP") support the cross-petitions filed by the Brotherhood of Locomotive Engineers ("BLE") and the United Transportation Union ("UTU"). The American Association of Railroads and the National Railway Labor Conference, as *amici*, agree that certiorari should be granted and, as BLE reads their brief, agree with the cross-petitioners that this Court should determine whether the carriers must follow the Railway Labor Act procedures in seeking to implement transactions sanctioned by the Commission (AAR Brief at 3, 7, 12, 19-20).

In sum, there is no dispute between the parties as to whether this case should be granted review. The only dispute centers upon the question to be presented. This reply, therefore, is submitted in support of the questions propounded by the union cross-petitions and tacitly underlying the question raised by the petitions.

ARGUMENT

All parties agree that BLE and UTU requested the ICC to hold that its order approving the consolidation of the UP, MP and Western Pacific and the applications of the MKT and the Denver and Rio Grande Western ("D&RGW") for trackage rights over MP tracks had not relieved any railroad from its Railway Labor Act obligations or the conditions prescribed for the protection of employees, and that crew assignments and manning issues were labor disputes and, therefore, not within the Commission's jurisdiction to resolve (See also BLE Petition for Reconsideration, JA 54). The ICC, however, held that it had jurisdiction to exempt under 49 U.S.C. §11341

(a) and that the exemption from the Railway Labor Act and all other restraints was self-executing under that section (BLE Cross-Pet. App. 66a). The questions raised by the unions before the appellate court are those questions formulated in the cross-petitions and decided by that court in its initial opinion. It is also apparent that all parties agree that the court of appeals in its amended opinion remanded to the Commission on the basis of its ruling that the ICC may not relieve a carrier from the Railway Labor Act dispute resolution procedures, as the Commission on reconsideration decided it had done in its initial order, without an adequate finding of necessity.

It is implicit in the ruling of the court of appeals that the Commission, in that court's view, does have jurisdiction over labor relations matters, including crew assignments, seniority and any other subject that conceivably could impede a transaction, and therefore can relieve a carrier from its Railway Labor Act obligations or, stated conversely, can deprive railroad employees of their collective bargaining and Railway Labor Act rights. Also, it cannot be questioned that this holding is the very foundation of its decision and goes to the heart of the issue raised by the employee representatives, BLE and UTU. The ICC and MKT nevertheless suggest that the only question this Court should consider is whether the carriers are automatically exempted by the Commission's order or whether, as the court below held, the Interstate Commerce Commission must in every case make specific findings of necessity.

This is a significance without a difference and the question the ICC and MKT now pose would not warrant review of this Court, for it is beyond cavil that the Commission, as any other agency, must supply some reasoned

basis for its determination and that its decision must be based on substantial evidence. *See, e.g., Northern Lines Merger Cases,* 396 U.S. 491, 503 (1970); *SEC v. Chenery Corp.,* 332 U.S. 194 (1947).

It would simply be a waste of the Court's time and resources to merely address the issue of whether the ICC is required to make specific findings of necessity in order to exempt the carrier participating in a Commission approved transaction from the requirements of the Railway Labor Act. Since the ICC and MKT take the position that the Commission's approval automatically exempts the rail carriers, and the Commission so decided in its decision on reconsideration, the issue before the court of appeals was whether the ICC approval authorizes the rail carriers to make unilateral changes in working conditions and in existing collective bargaining agreements in contravention of the duties imposed by the Railway Labor Act. In short, the real issue to be decided at this time is whether there is in fact a conflict between the Interstate Commerce Act and the Railway Labor Act and, if so, which statute governs employee-management relations in connection with ICC approved transactions. While disagreeing with the conclusory observation of the AAR as to the effect of the decision below, BLE notes that the AAR does cogently point up the ingredient question before the Court when it states at pages 18-19 of its *amicus* brief:

> The fact that the court of appeals in the instant case has ordered a remand to the Commission should not be a deterrent to certiorari. On remand the Commission can only repeat, for the reasons stated by the Eighth Circuit in *BLE v CNW*, that the RLA is preempted with respect to the crew selection provisions

> of the approved trackage rights transactions. That will not ameliorate the harm caused by the ruling of the court below that the RLA can be preempted only to the extent found necessary by the Commission * * *.

This case is an appropriate vehicle to determine the accommodation between the Interstate Commerce Act and the Railway Labor Act, if indeed a conflict exists between them. Only the cross-petitions present issues dealing with the preemption raised by the ICC and permitting the discussion and treatment of the conflict, if any does exist.

Moreover, the sudden departure by the ICC from its normal rulings as to its power over labor matters, and the breadth of this historical change relieving rail carriers of their contractual and Railway Labor Act obligations to their employees suggest that this Court consider the questions set forth in the cross-petitions.

(1) In this connection, contrary to MKT's assertion at pages 6-12 of its Brief in Opposition to the Cross-Petitions, the authorities previously cited by the union cross-petitioners and the most recent decision of the ICC in *Lackawanna County Railroad Authority, Inc. - Exemption From Regulation*, Finance Docket No. 30628 (served February 11, 1986), *infra* at 1a, in which the Commission refused to consider labor matters or the factual situation presented by the unions on the basis those matters are outside its jurisdiction, establish, if not inconsistent treatment, an abrupt, unexplained change in the ICC's approach to labor matters in the situation at bar. Thus, in the basic proceedings before the ICC, such as in Finance Docket No. 30,000 involving the UP-MP merger, labor matters are excluded as immaterial, or at best given short shrift, which is the Commission's customary approach.

Subsequently, on review, however, the Commission and the carrier (MKT) argue that the automatic exemption—according to their line of reasoning—on labor matters cannot be reviewed, because no evidence is in the record or the unions failed to challenge the treatment of labor matters contained in the financial agreements presented for Commission approval. This kind of reasoning, of course, forever forecloses railroad employees from exercising any voice in workplace decisions arising out of ICC approved transactions or from challenging in detail the legal and factual bases of the railroads' unilateral decisions that abrogate their collective bargaining rights. Moreover, neither the ICC, nor MKT has been able to explain the manner in which the decision of the ICC in this case, *i.e.*, the carrier is relieved of its collective bargaining obligations and from the mandatory duties imposed by the Railway Labor Act, complies with the labor protections imposed by it, which prescribe that existing collective bargaining agreements be maintained until changed by agreement or in accordance with the Railway Labor Act.

(2) As also is clear, the issue before the court of appeals was the same issue before the ICC, was directly decided by the court below in its original opinion, was necessarily embodied in the amended opinion, and was adequately preserved by the union cross-petitioners so as to be the basis of the question presented to this Court. Although MKT asserts that the BLE and UTU only argued to the court of appeals that there was a conflict between two separate provisions of the Interstate Commerce Act (MKT Brief in Opposition at 12-13), and therefore that court did not entertain or decide the issue now presented by the unions, this position begs credulity when one reads the opinion of that court. While the court of appeals seems

to correlate the Railway Labor Act and the labor protections imposed by Section 11347, it is clear that the court treated the current dispute as one over the ICC's claim "that the Railway Labor Act was a 'law' appropriately waived in the exercise of its exclusive authority," (BLE Cross-Pet. App. 20a). And later the court said, "the Commission therefore exceeded its authority when it claimed to have waived the Railway Labor Act regarding crew selection." (*Id.* at 22a).

(3) Finally, the statements of the ICC and MKT adroitly evade the concept implicit in the history of railroad employee protection and previous legal authority, *to wit*, the ICC formulated conditions do not intrude on the collective bargaining agreements in force or exempt railroads from the procedures of the Railway Labor Act, which statute is founded upon the policy of seeking industrial stability through the exercise of a voice by workmen in their industrial life. In 1936, railroad labor and management at the direction of Congress and the federal government reached an agreement on employee protection, which was called the Washington Job Protection and through amendments to the Interstate Commerce Act became the basis of the ICC formulated conditions. (*These* subjects are discussed in *United States v. Lowden*, 308 U.S. 225 (1939) and the appendix in *St. Joe Paper Co. v. Atlantic Coast Line R. Co.*, 347 U.S. 298, 315 (1954).) This compact between the parties, which achieved statutory status, provided for specified labor protections to accompany certain economies and efficiencies sought by carriers. For years, the procedures for allowing these economies to the carriers and the concomitant benefits and protections to their employees worked smoothly and without controversy. Now, however, the Commission has without basis deprived the employees of their side of the

bargain and given the carriers unfettered authority to unilaterally act on labor relations matters. In effect, the Commission has removed the basis of the compact. Clearly, this is inequitable. At a minimum, the employees should be left where they were in 1936, *i.e.*, having the right to exercise the Railway Labor Act procedures.

Viewed from these perspectives, it is clear that the issue as posed in BLE's cross-petition is properly before the Court and represents the only issue worthy of this Court's consideration, particularly in light of pending and threatened litigation dependent upon resolution of whether Section 11341(a) relieves a rail carrier of its obligations under the Railway Labor Act or its collective bargaining agreements.

CONCLUSION

For the foregoing reasons, and for the reasons previously stated in the cross-petition of the Brotherhood of Locomotive Engineers, said cross-petition should be granted.

Respectfully submitted

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APPENDIX

Decision of the Interstate Commerce Commission

(Decided January 24, 1986)

INTERSTATE COMMERCE COMMISSION
DECISION

Finance Docket No. 30628

LACKAWANNA COUNTY RAILROAD AUTHORITY, INC. - EXEMPTION FROM REGULATION

We are denying the petitions to reopen filed by the Pennsylvania State Legislative Board-United Transportation Union (UTU), the Brotherhood of Locomotive Engineers (BLE), and The Brotherhood of Maintenance of Way Employees (BMWE).

In a decision served on March 22, 1985,[1] we exempted the Lackawanna County Railroad Authority, Inc. (LCRA) from 49 U.S.C. Subtitle IV. That exemption also covered LCRA's: (a) acquisition of the following lines from the Delaware and Hudson Railway Corporation (D&H) in Lackawanna County, PA: (1) a portion of the Carbondale Branch between MP 196.8 in the Borough of Moosic and MP 174.59 in the Township of Fell, a distance of 22.21 miles; and (2) the 1.2-mile Vine Street Branch; and (b) acquisition of incidental trackage rights over D&H between MP 130.4 at Minooka Junction and MP 133.8 at Bloom Junction. We also exempted Lackawanna Valley Railroad Corporation (LVRC) from the prior approval requirements of 49 U.S.C. 10901 to operate the above-described lines.

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1. 50 Fed. Reg. 11950 (March 26, 1985).

PRELIMINARY MATTERS

BLE moves for leave to late-file a petition to join in UTU's petition to reopen. LCRA, LVRC, and D&H jointly move to strike BLE's motion on the grounds that the decision served March 22, 1985 is administratively final as to BLE, and that BLE has not shown material error, new evidence, or substantially changed circumstances to justify reopening. However, our rules of practice are to be construed liberally (49 C.F.R. 1100.3), and we find that BLE's petition does not broaden the issues raised in UTU's petition. Accordingly, BLE's motion for leave to late-file is granted, and the motion to strike is denied.

BLE replied to the motion to strike, arguing that equitable considerations relating to a wage deferral agreement between labor and D&H preclude transfer of a D&H line without imposition of labor protective conditions. D&H, LCRA, and LVRC responded to BLE's arguments and move to strike them on the grounds that some are redundant and the above argument broadens the issues. Since those carriers have been able to respond and thus have not been prejudiced, we will deny their motion to strike.

On July 11, 1985, BMWE late-filed a letter-petition stating that it endorses UTU's and BLE's petitions to reopen. It also attached a brief verified statement, to which D&H, LCRA, and LVRC replied. Although BMWE's filing is late, and we admonish it to act promptly in the future or its pleadings will be rejected, we will accept its petition since it relies primarily on the record already made and D&H, LCRA, and LVRC have been able to respond to it.

BACKGROUND

LCRA, a noncarrier municipal corporation, entered an agreement with D&H to acquire the two line segments and trackage rights. It plans to rehabilitate the lines, but will not hold itself out as an operator. Instead, operations will be performed by LVRC.

UTU, BLE, and BMWE have petitioned to reopen because we did not impose employee protection conditions on D&H when we granted the exemptions. D&H embargoed the northern 16-mile segment in December 1983 because of poor track conditions. It operated over the southern 7-mile portion on an "as needed" basis, which was usually two or three times a week. D&H did not file an abandonment application.

DISCUSSION AND CONCLUSIONS

Petitioners first argue that we should dismiss the exemption petitions because the purchase and operating agreements are not in evidence. However, detailed proof for exemptions is neither required by 49 U.S.C. 10505 nor by our exemption procedures. Ex Parte No. 400, *Modification of Procedure For Handling Exemptions Filed Under 49 U.S.C. 10505,* (not printed), served December 29, 1980.

Petitioners next argue that LVRC's operation of LCRA's line is governed by 49 U.S.C. 11343, because exemption from that section was the relief they requested. We determine which statute governs our deliberations based on an analysis of the actual nature of the transaction. Neither LVRC nor LCRA were carriers when they filed the exemption. Section 11343 is applicable only to transactions where both the buyer and seller of rail property are carriers. *Application Proc. - Construc. Acq. or Opr. R. Lines,* 365 I.C.C. 516, 518 (1982). Section 10901, how-

ever, governs rail entry and the creation of new carriers. Since LVRC and LCRA are new carriers, section 10901 would govern this transaction, if it had not been exempted, not section 11343.

Petitioners also contend that we erred in finding that the proposed trackage rights are *de minimis* and purely incidental to the section 10901 acquisition. However, the proposed trackage rights are only 4 miles in length and in concert with the acquisitions constitute a single, new, integrated operating proposal. Since the trackage rights transaction is contemporaneous with and incidental to the section 10901 acquisition, it also falls within section 10901. *See* Finance Docket No. 30505, *Alabama So. R.R. Co. and the Alabama Great S. R.R. Co. - Acqs., Opers. and Trackage Rts. - Exemption,* ..... I.C.C. 2d. ..... (1984).

Petitioners further contend that D&H desires to abandon the involved lines and that it cannot escape liability for employee protection conditions by selling the lines. UTU cites some cases similar to this proceeding (although they did not involve exemptions) in which we imposed abandonment-type labor protection conditions on vendors of the involved lines. Contrary to its assertion, however, imposition of such conditions was discretionary, not mandatory. *See Knox & Kane R. Co.—Petition for Exemption,* 366 I.C.C. 439, 443 (1982) (*Knox*).

Petitioners' assertion that section 10903 governs D&H's discontinuance of its operations is incorrect. We have uniformly held that noncarrier acquisition of a rail line is governed by section 10901. *Application Proc. - Construc. Acq. or Oper. R. Lines,* 365 I.C.C. 516 (1982). This policy has been applied consistently in granting exemption from the requirements of 49 U.S.C. 10901 where the proposed transaction would result in the transfer of a rail line slated

for abandonment by a carrier to a noncarrier proposing to continue rail operations. *See, e.g.*, Finance Docket No. 30462, *Burlington, C.R. & N. Ry. Co. - Exemption* (not printed), served May 21, 1984, and Finance Docket No. 30431, *Minnesota Valley Transportation Co., Inc. - Southwest - Temporary Exemption* (not printed), served March 16, 1984. The Commission's holding that a certificate of abandoment is not required when a railroad contemplating abandonment sells its line to a noncarrier has been sustained in *Illinois v. United States,* 604 F.2d 519 (7th Cir. 1979); *In re Chicago, Milwaukee, St. Paul & Pacific R.R. Co.,* 658 F. 2nd 1149, 1164, 1169 (7th Cir. 1981), *cert. denied,* 445 U.S. 1000 (1982); and *Railway Labor Executives' Assn. v. United States,* 697 F.2nd 285 (10th Cir. 1983).

Petitioners also argue that *Smith v. Hoboken R. Co.,* 328 U.S. 123 (1946) (*Smith*) requires D&H to abandon its line before LCRA can acquire it. This is an improper reading of *Smith. Smith* was decided under section 77 of the Bankruptcy Act, not the Interstate Commerce Act. More importantly, *Smith* involved an involuntary lease forfeiture situation, not a voluntary sale.

UTU is also incorrect in claiming that the only instances where the Commission has permitted a carrier to transfer its line to another person without imposition of employee conditions involve "entire line" abandonments. *Knox, supra,* for example, which involved acquisition of track from the Baltimore and Ohio Railroad Company, did not involve an entire line abandonment. Furthermore, in that decision, at 443-444, we stated several reasons why imposition of protective conditions on vendors may have effects contrary to objectives of the rail transportation policy. We concluded that "although

the imposition of the *Oregon III* conditions on a vendor may at times be justified, there are countervailing considerations which dictate that this policy not be reflexively applied." No showing justifying the imposition of labor protective conditions has been made.

BMWE alleges that five D&H employees have already been adversely affected by a change in the location of the headquarters to which they report. It notes that, prior to the sale of the Carbondale Branch, D&H closed its facilities at Carbondale, Green Ridge, and Wyoming Avenue in anticipation of the sale. It predicts that additional employees will be displaced or furloughed due to the sale unless labor protective conditions are imposed on D&H. The carriers reply that BMWE's allegations are unsubstantiated and that it waited so long to submit its views that it requests retroactive application of labor protection on a consummated transaction.

The facts BMWE has outlined are similar to those in *Knox, supra.* In *Knox* a number of employees were adversely affected by the transaction. However, the Commission found that the rail transportation policy considerations concerning fair wages and safe and suitable working conditions in the industry were outweighed by policy objectives to foster sound economic conditions in transportation and to ensure the development and continuation of a sound rail transportation system. We reach the same conclusion here and will not impose protective conditions on D&H based on BMWE's arguments.

BLE argues that equity demands the imposition of protective conditions because D&H and 21 labor organizations, including BLE, signed a still-effective 12 percent wage deferral agreement as a means of D&H reaching self sufficiency. One of the considerations in this agree-

ment was the creation of job stability for the D&H employees who gave up 12 percent of their wages. BLE quotes Item 11 of its agreement in which D&H:

> [A]grees to maintain a rigid observance of all existing contract provisions relating to the transfer of work to other D&H work sites *or to other rail companies,* particularly those owned or sought to be owned by GTI. (Emphasis added).

BLE contends that the agreement commits D&H to using its employees to serve those lines transferred to another, and that D&H can change its commitment only by serving notice under section 6 of the Railway Labor Act and negotiating a change. BLE further argues that the Commission may not, through the exemption process, relieve D&H of its commitment, and that failure to grant D&H's employees protection based on D&H's contractual representation to them would constitute an abuse of discretion.

D&H, LCRA, and LVRC reply that this is an issue beyond the Commission's jurisdiction because it involves disputes as to the interpretation of labor agreements that should be resolved pursuant to their provisions and the Railway Labor Act. They also contend that sale of a rail line does not constitute farming out or transfer of work.

Whether or not the agreement between D&H and its employees is a matter that applies to these transactions is outside of our jurisdiction. Therefore, our refusal to impose labor protection, in the face of this agreement is not an abuse of discretion, and would not resolve any conflict [sic] it.

The prior decision inadvertently failed to exempt LVRC from the prior approval requirements of 49 U.S.C.

11301 to permit it to issue $50,000 in common stock to provide initial working capital, although such an exemption was clearly intended by the discussion in the decision. Accordingly, we will revise the second ordering paragraph in our prior decision to exempt the stock issuance.

We conclude that the petitions for reopening should be denied, and that employee protective conditions are not required.

This action would not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. BLE's and BMWE's motions for leave to join in UTU's petition are granted.

2. The motions of LCRA, LVRC and D&H to strike are denied.

3. Ordering paragraph number 2 in the prior decision is revised to read:

> 2. Lackawanna Valley Railroad Corporation is exempted from the prior approval requirements of (a) 49 U.S.C. 10901 to operate the line, and (b) 49 U.S.C. 11301 to issue $50,000 in common stock.

4. The petitions to reopen are denied.

5. This decision is effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Sterrett, Andre and Lamboley. Commissioner Lamboley concurred with a separate expression.

James H. Bayne
Secretary

(SEAL)

Finance Docket No. 30628

COMMISSIONER LAMBOLEY, concurring:

Although I concur in the result, I do not share the majority's discussion and conclusions on certain issues.

First, I continue to believe that as structured, the trackage rights, while an integral part of the transaction, are more properly encompassed by § 11343. § 11343 and § 10901 are compatible and not to be construed as mutually exclusive. See *People of Ill. v. I.C.C.*, 604 F2d 519 (7th Cir. 1979).

Second, the decision fails to adequately discuss the common carrier obligations in relation to the purchase of the *active*, rail line. The majority terms both LVRC and LCRA as new carriers, yet the original decision notes only that LVRC assumes the common carrier obligation.

The decisions are silent and potentially confusing as to whether LCRA may have any common carrier obligation, notwithstanding LVRC's current assumption of obligation.[1]

Third, the decision fails to review the issue whether, for purposes of considering labor protection criteria and the seller's status, there is a conceptual distinction between

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1. This issue seems squarely raised by (1) the fact LCVA [sic] requested exemption from such obligation, and (2) the protestants' arguments on reopening assume that LCRA was not so exempted, and does in fact have a common carrier obligation. Certainly those who are economically interested in and support continued rail service should not be left without Commission clarification of this issue.

transactions involving sale of an active rail line and abandonment.[2]

Finally, it is appropriate to point out that meaningful review of labor protection issues are frequently hindered, as here, by the lack of an adequate presentation of specific factual evidence concerning dislocation and economic impact. General conclusionary allegations are simply not sufficient.

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2. This issue, although suggested by the cited Commission's discussion in *Knox & Kane Railroad Co. - Gettysburg Railroad Co. - Petition for Exemption*, 366 I.C.C. 439 (1982) is not reviewed in that case nor in our recent decision in Ex Parte No. 392 (Sub-No. 1), *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. §10901*, I.C.C. 2d (served January 15, 1986).